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Comments:

Inventor(s): Klofta et al.

S.N.: 09/898,880

Confirmation No.: 2203

Filed: July 3, 2001

Case: 8622

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Case 8622

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In the Application of :
THOMAS J. KLOFTA, ET AL. :
Serial No.: 09/898,880 : Group Art Unit: 1616
Filed: July 3, 2001 : Examiner: K. M. George
For: FILM-FORMING COMPOSITIONS FOR :
PROTECTING SKIN FROM BODY :
FLUIDS AND ARTICLES MADE :
THEREFROM :

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is a Brief on Appeal of currently pending Claims 1-25 of the above-identified application of which Claims 1-19 have been withdrawn. Claims 20-25 were finally rejected in an Office Action dated August 6, 2003. A Notice of Appeal was transmitted on November 19, 2003. According to 37 C.F.R. § 1.192, this Brief is being filed in triplicate within two months of the Office date of receipt of the Notice of Appeal (November 19, 2003). As January 19, 2004, is a Federal holiday within the District of Columbia, this Brief is believed to be timely filed, per 35 U.S.C. § 21, on January 20, 2004. Authorization is given to charge any fees required under 37 CFR § 1.17 related to this appeal to Deposit Account No. 16-2480.

REAL PARTY IN INTEREST

The Appellants who are named in the caption of the brief have assigned this application to the Procter & Gamble Company.

In the Appeal of
Application Serial No. 09/898,880

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RELATED APPEALS AND INTERFERENCES

Appellants, Appellants' legal representative, and the assignee are not aware of any interferences or appeals which would be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 1-25 are currently pending. Claims 20-25 were finally rejected by an Office Action mailed on August 6, 2003. Claims 1-19 have been withdrawn.

The rejection of Claims 20-25 is being appealed. A copy of Claims 20-25 on appeal appears in the attached Appendix A.

STATUS OF AMENDMENTS

No amendments have been filed subsequent to the Examiner's final rejection of Claims 20-25.

SUMMARY OF THE INVENTION

The claimed invention relates to a disposable absorbent article. The disposable absorbent article has a film-forming composition (page 3, line 23 – page 15, line 13) disposed on at least a skin-contacting surface of the absorbent article (page 15, lines 24-32), wherein the composition is substantially anhydrous (page 3, line 34) and is solid or semi-solid at room temperature (page 4, line 8). The composition comprises:

- from about 1 to about 80, by weight percent, of a skin conditioning agent selected from the group consisting of petroleum based emollients; fatty acid esters; polysiloxanes; polyol polyesters; esters or ethers of polyhydroxy alcohols; fatty alcohol esters of polyprotic acids; animal oils, fats, and their derivatives; vegetable oils, hydrogenated vegetable oils, and their derivatives; branched hydrocarbons; fatty alcohol ethers; free sterols, sterol esters and their derivatives; sphingolipids; phospholipids; and mixtures thereof (page 5, lines 22-26);

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- from about 15 to about 50, by weight percent, of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof (page 10, lines 10-13);
- from about 1 to about 20, by weight percent, of a film-forming agent selected from the group consisting of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof (page 12, line 29 -page 13, line 23); and
- optionally, from about 0.01 to about 10, by weight percent, of a skin care ingredient selected from the group consisting of Monographed I actives, Monographed III actives, vitamins, proton donating agents, protease inhibitors, enzyme inhibitors, chelating agents, anti-microbials, skin soothing agents, and mixtures thereof (page 13, line 24 - page 14, line 16); wherein the composition is resistant to water, wash-off, and rub-off (page 3, lines 29-30 and page 1, lines 34-36).

Appellants have found that the claimed composition forms a film that adheres to the skin such that it resists rub-off by abrasion with clothing or other contacting surfaces and wash-off by water or other bodily fluids such as urine, menses, sweat, and runny bowel movements (page 1, lines 34-36). The film contains beneficial skin care ingredients and skin conditioning agents that are then held in intimate and prolonged contact with the skin such that they are able to provide benefit to the skin (page 3, lines 30-32).

ISSUE

Whether Claims 20-25 were properly rejected under 35 U.S.C. §103(a) as being unpatentable over Roe (5,609,587) in view Wenninger et al. (*Int. Cos. Incred. Dict. and Hand.*, 7th ed., 1997).

GROUPING OF CLAIMS

The claims stand and fall together with respect to the issue.

ARGUMENTS

Whether Claims 20-25 were properly rejected under 35 U.S.C. §103(a) as being unpatentable over Roe (U.S. Pat. No. 5,609,587) in view Wenninger et al. (*Int. Cos. Incred. Dict. and Hand.*, 7th ed., 1997).

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Application Serial No. 09/898,880

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The Office asserts that Roe discloses a diaper having a lotioned topsheet where the lotion composition comprises: 1) a liquid polyol polyester emollient, 2) an immobilizing agent(s) for the liquid polyol polyester emollient; 3) optionally, a hydrophilic surfactant; and 4) other optional components including film formers. The Office states that the skin-conditioning agent of Appellants' claimed invention is the polyol polyester disclosed in Roe. The Office states that viscosity agent of Appellants' claimed invention is the immobilizing agent disclosed in Roe. The Office acknowledges that Roe does not teach the specific film-forming agent as claimed by the Appellants. In order to correct this deficiency, the Office states that Wenninger discloses the use of acrylates copolymers and polyethylene as film-forming agents. The Office concludes that it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the acrylates copolymers and polyethylene as disclosed in Wenninger in the invention of Roe. For the reasons discussed below, Appellants submit that the appealed claims are not rendered obvious over Roe in view Wenninger.

The Office Improperly Uses a Reference that Teaches Away from Appellants' Claimed Invention.

Appellants' Claim 20 recites a film-forming composition "wherein the composition is resistant to water, wash-off, and rub-off." Roe discloses that "it is important that the lotion composition also be sufficiently wettable to ensure that liquids will transfer through the topsheet." Col. 21, lines 44-46. Roe discloses that an optional hydrophilic surfactant may be employed to provide wettability to the Roe lotion composition; however, Roe states that "immobilizing agents such as C₁₆-C₁₈ fatty alcohols having HLB (hydrophilic-lipophilic balance) values below about 7 will *require* addition of hydrophilic surfactant to improve wettability." Col. 21, lines 57-59 (emphasis added). The Office states that the Appellants' viscosity enhancing agents (e.g., C₁₂-C₆₀ alcohols) are the same as the immobilizing agents of Roe. Summarily, according to Roe, use of fatty alcohols as the immobilizing agents requires the use of hydrophilic surfactants to increase wettability.

Wettability is clearly not desired in Appellants' invention. Appellants' Claim 20 requires the composition to be resistant to water and substantially anhydrous. A lotion composition containing a hydrophilic surfactant as required by Roe would not be resistant to water or anhydrous since the hydrophilic surfactant is taught to increase the wettability of the lotion. Case law clearly states, "It is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art." *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 448 (Fed.

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Cir. 1986). The Office has selectively chosen portions of Roe without a full appreciation of the teachings away from the Appellants' claimed invention. Roe, when using Appellants' C12-C60 alcohols, requires use of a hydrophilic surfactant which is contrary to Appellants' claimed limitation of a lotion composition that is substantially anhydrous and resistant to water and wash-off.

The Office Fails to Establish a *Prima Facie* Case of Obviousness by Failing to Teach All Appellants' Claim Limitations

To establish a *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981 (CCPA 1974). The Office has failed to teach or suggest at least two of Appellants' claimed limitations.

First, the references presented by the Office fail to teach or suggest a lotion composition resistant to water, wash-off, or rub-off. Claim 20 recites the limitation of a film-forming composition "wherein the composition is resistant to water, wash-off, and rub-off." Roe and Wenninger fail to teach or suggest a composition that is resistant to water, wash-off, and rub-off. Likewise, the hypothetical combination of Roe and Wenninger provides no teaching or suggestion of resistance to water, wash-off, or rub-off. As a result, the Office has failed to make a *prima facie* case of obviousness since all the claimed limitations are neither taught nor suggested in the references either separately or in combination.

Second, the references presented by the Office fail to teach or suggest a lotion composition comprising the claimed film-forming agents. Claim 20 recites the limitation of a film-forming agent selected from "polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof." Case law supports the rule that a claimed species or subgenus encompassed by a prior art genus is not sufficient by itself to establish a *prima facie* case of obviousness. See *In re Baird*, 16 F.3d 380 (Fed. Cir. 1994); MPEP 2144.08. Such is the case in the present application. Roe discloses a genus of film formers that can be optionally used in a lotion composition. Appellants identify and claim three discrete compounds (i.e., polyalkenes, PVP/alpha-olefin copolymers, and acrylic copolymers) that may be used as film forming agents. The Office states, "With respect to the specific film forming agents as claimed by the applicant, it is the position of the examiner that the disclosure of film formers is directed to a broad category and that all compounds that are film formers fall within its scope."

The Office also offers Wenninger as a reference teaching the use of acrylates copolymer and polyethylene as film formers. While Wenninger does disclose acrylates copolymer and polyethylene as being film formers, Wenninger is a dictionary listing all film formers for use

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within a cosmetic. Wenninger discloses nothing more than the genus of film formers, albeit by defining the genus by every possible species. Appellants assert that the Office has substituted the genus presented in Wenninger for the genus presented in Roe. As a result, the basis for the rejection of a particular species is still improperly based upon the disclosure of a genus which in itself is insufficient to establish a *prima facie* case of obviousness.

The Office Fails to Provide a Suggestion or Motivation to Modify the References Cited

The Office has provided no suggestion or motivation to modify the references cited by the Office. Roe discloses several optional ingredients (e.g., water, pH reducing or buffering systems, vitamins, skin smoothing agents, anti-inflammatories, viscosity modifiers, perfumes, disinfectant antibacterial actives, pharmaceutical actives, film formers, deodorants, opacifiers, astringents, solvents, etc.) that may be used in a lotion composition. Col. 23, lines 27-44. From the numerous combinations that could be selected from the optional ingredients, one of ordinary skill in the art must first choose to focus on the film forming agents. Then, from a dictionary that lists all film formers used in cosmetics, one of ordinary skill in the art must then choose Appellants' film formers of polyalkenes, PVP/alpha-olefin copolymers, and acrylic copolymers.

As motivation for this combination of references, the Office quotes from Roe: "[A]ll these materials are well known in the art as additives for such formulations and can be employed in appropriate amounts in the lotion compositions of the present invention (of Roe)." See Office Action dated April 10, 2002, page 4; Office Action dated August 8, 2002, page 3; Office Action dated August 6, 2003, page 3. However, the "materials" Roe references are all the optional ingredients. The "motivation" asserted by the Office would leave one skilled in the art in the same position had no such motivation been provided. Namely, one skilled in the art must select film formers from the list of optional ingredients provided by Roe and then select the Appellants' specific film formers from a listing of all possible film formers as provided by Wenninger.

In *Ex parte Hiyamizu*, 10 USPQ2d 1993 (BPAI 1988), the Board stated that "there should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the references in such a manner as to arrive at the claimed invention." The Office has failed to establish a *prima facie* case of obvious since there is nothing in the cited references nor a line of reasoning to suggest combining the references to yield the Appellants' claimed invention.

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The Office Fails to Provide an Enabling Disclosure from the References Cited


Case law states that the "[r]eferences relied upon to support a rejection under 35 U.S.C. 103 must provide an enabling disclosure, i.e., they must place the claimed invention in the possession of the public." *In re Payne*, 606 F.2d 303, 314 (CCPA 1979). Roe and Wenninger merely teach the use, without specificity or quantification, of optional ingredients in the lotion composition and article disclosed in Roe. The possible resultant combinations of each optional ingredient both alone and in combination with the other optional ingredients are numerous. Since no teaching exists within the reference, the appropriate amount of any selected optional ingredient must be determined experimentally by one skilled in the art. The Office has asserted that "determination of particular concentrations is within the skill of the ordinary worker as part of the process of normal optimization." See Office Action dated March 19, 2003, page 3. However, given the number of optional ingredients available, the number of possible species available for each optional ingredient, and the experimentation necessary to determine the appropriate amount of each species; the teachings of Roe and Wenninger are at best an invitation to try various combinations of the optional ingredients at variable amounts. Case law clearly states that "obvious to try" is not the standard for obviousness. See *In re Geiger*, 815 F.2d 686, 687 (Fed. Cir. 1987). As such, the Office has failed to establish a *prima facie* case of obvious.

SUMMARY

The Appellants submit that they have shown that the Examiner's final rejection of Claims 20-25 was improper and that the claims are unobvious over the cited art. Accordingly, the Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection under 35 USC § 103(a) and remand with directions to allow all of the pending claims of the present application.

Respectfully submitted,

For: Thomas J. Klofta et al.

By 
Eric T. Addington
Agent for Appellant(s)
Registration No. 52,403
(513) 626-1602

Date: January 20, 2004
Customer No. 27752

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Application Serial No. 09/898,880

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Appendix A

20. A disposable absorbent article having a film-forming composition disposed on at least a skin-contacting surface of the absorbent article, wherein the composition is substantially anhydrous and is solid or semi-solid at room temperature, the composition comprises:

- a. from about 1 to about 80 wt% of a skin conditioning agent selected from the group consisting of petroleum-based emollients; fatty acid esters; polysiloxanes; polyol polyesters; esters or ethers of polyhydroxy alcohols; fatty alcohol esters of polyprotic acids; animal oils, fats, and their derivatives; vegetable oils, hydrogenated vegetable oils, and their derivatives; branched hydrocarbons; fatty alcohol ethers; free sterols, sterol esters and their derivatives; sphingolipids; phospholipids; and mixtures thereof;
- b. from about 15 to about 50 wt% of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof;
- c. from about 1 to about 20 wt% of a film-forming agent selected from of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof; and
- d. optionally, from about 0.01 to about 10 wt% of a skin care ingredient selected from the group consisting of Monographed I actives, Monographed III actives, vitamins, proton donating agents, protease inhibitors, enzyme inhibitors, chelating agents, anti-microbials, skin soothing agents, and mixtures thereof; and

wherein the composition is resistant to water, wash-off, and rub-off.

21. The disposable absorbent article of Claim 20, wherein the skin-contacting surface is selected from the group consisting of a topsheet, a cuff, a side panel, a waist region, a secondary layer underlying a topsheet, a bowel movement pocket, an insertable element inserted into the absorbent article for use during wear, and combinations thereof.

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22. The disposable absorbent article of Claim 20, wherein the skin conditioning agent is a petroleum-based emollient selected from the group consisting of petrolatum, mineral oil, and mixtures thereof.
23. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an organic viscosity enhancing agent having a melting point of at least about 35°C.
24. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is a wax.
25. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an alcohol selected from the group consisting of cetyl alcohol, stearyl alcohol, behenyl alcohol, and mixtures thereof.

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Case 8622**RECEIVED**
CENTRAL FAX CENTER**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES****JAN 20 2004**

In the Application of :
THOMAS J. KLOFTA, ET AL. :
Serial No.: 09/898,880 : Group Art Unit: 1616
Filed: July 3, 2001 : Examiner: K. M. George
For: FILM-FORMING COMPOSITIONS FOR :
PROTECTING SKIN FROM BODY :
FLUIDS AND ARTICLES MADE :
THEREFROM :

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

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REAL PARTY IN INTEREST

The Appellants who are named in the caption of the brief have assigned this application to the Procter & Gamble Company.

In the Appeal of
Application Serial No. 09/898,880

2

RELATED APPEALS AND INTERFERENCES

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- from about 15 to about 50, by weight percent, of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof (page 10, lines 10-13);
- from about 1 to about 20, by weight percent, of a film-forming agent selected from the group consisting of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof (page 12, line 29 -page 13, line 23); and
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Whether Claims 20-25 were properly rejected under 35 U.S.C. §103(a) as being unpatentable over Roe (5,609,587) in view Wenninger et al. (*Int. Cos. Incred. Dict. and Hand.*, 7th ed., 1997).

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The claims stand and fall together with respect to the issue.

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In the Appeal of
Application Serial No. 09/898,880

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Wettability is clearly not desired in Appellants' invention. Appellants' Claim 20 requires the composition to be resistant to water and substantially anhydrous. A lotion composition containing a hydrophilic surfactant as required by Roe would not be resistant to water or anhydrous since the hydrophilic surfactant is taught to increase the wettability of the lotion. Case law clearly states, "It is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art." *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 448 (Fed.

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The Office has provided no suggestion or motivation to modify the references cited by the Office. Roe discloses several optional ingredients (e.g., water, pH reducing or buffering systems, vitamins, skin smoothing agents, anti-inflammatories, viscosity modifiers, perfumes, disinfectant antibacterial actives, pharmaceutical actives, film formers, deodorants, opacifiers, astringents, solvents, etc.) that may be used in a lotion composition. Col. 23, lines 27-44. From the numerous combinations that could be selected from the optional ingredients, one of ordinary skill in the art must first choose to focus on the film forming agents. Then, from a dictionary that lists all film formers used in cosmetics, one of ordinary skill in the art must then choose Appellants' film formers of polyalkenes, PVP/alpha-olefin copolymers, and acrylic copolymers.

As motivation for this combination of references, the Office quotes from Roe: "[A]ll these materials are well known in the art as additives for such formulations and can be employed in appropriate amounts in the lotion compositions of the present invention (of Roe)." See Office Action dated April 10, 2002, page 4; Office Action dated August 8, 2002, page 3; Office Action dated August 6, 2003, page 3. However, the "materials" Roe references are all the optional ingredients. The "motivation" asserted by the Office would leave one skilled in the art in the same position had no such motivation been provided. Namely, one skilled in the art must select film formers from the list of optional ingredients provided by Roe and then select the Appellants' specific film formers from a listing of all possible film formers as provided by Wenninger.

In *Ex parte Hiymizu*, 10 USPQ2d 1993 (BPAI 1988), the Board stated that "there should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the references in such a manner as to arrive at the claimed invention." The Office has failed to establish a *prima facie* case of obvious since there is nothing in the cited references nor a line of reasoning to suggest combining the references to yield the Appellants' claimed invention.

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The Office Fails to Provide an Enabling Disclosure from the References Cited

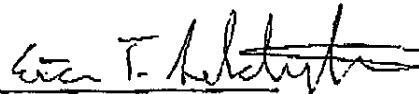
Case law states that the "[r]eferences relied upon to support a rejection under 35 U.S.C. 103 must provide an enabling disclosure, i.e., they must place the claimed invention in the possession of the public." *In re Payne*, 606 F.2d 303, 314 (CCPA 1979). Roe and Wenninger merely teach the use, without specificity or quantification, of optional ingredients in the lotion composition and article disclosed in Roe. The possible resultant combinations of each optional ingredient both alone and in combination with the other optional ingredients are numerous. Since no teaching exists within the reference, the appropriate amount of any selected optional ingredient must be determined experimentally by one skilled in the art. The Office has asserted that "determination of particular concentrations is within the skill of the ordinary worker as part of the process of normal optimization." See Office Action dated March 19, 2003, page 3. However, given the number of optional ingredients available, the number of possible species available for each optional ingredient, and the experimentation necessary to determine the appropriate amount of each species; the teachings of Roe and Wenninger are at best an invitation to try various combinations of the optional ingredients at variable amounts. Case law clearly states that "obvious to try" is not the standard for obviousness. See *In re Geiger*, 815 F.2d 686, 687 (Fed. Cir. 1987). As such, the Office has failed to establish a *prima facie* case of obvious.

SUMMARY

The Appellants submit that they have shown that the Examiner's final rejection of Claims 20-25 was improper and that the claims are unobvious over the cited art. Accordingly, the Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection under 35 USC § 103(a) and remand with directions to allow all of the pending claims of the present application.

Respectfully submitted,

For: Thomas J. Klofta et al.

By 

Eric T. Addington
Agent for Appellant(s)
Registration No. 52,403
(513) 626-1602

Date: January 20, 2004
Customer No. 27752

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Appendix A

20. A disposable absorbent article having a film-forming composition disposed on at least a skin-contacting surface of the absorbent article, wherein the composition is substantially anhydrous and is solid or semi-solid at room temperature, the composition comprises:

- a. from about 1 to about 80 wt% of a skin conditioning agent selected from the group consisting of petroleum-based emollients; fatty acid esters; polysiloxanes; polyol polyesters; esters or ethers of polyhydroxy alcohols; fatty alcohol esters of polyprotic acids; animal oils, fats, and their derivatives; vegetable oils, hydrogenated vegetable oils, and their derivatives; branched hydrocarbons; fatty alcohol ethers; free sterols, sterol esters and their derivatives; sphingolipids; phospholipids; and mixtures thereof;
- b. from about 15 to about 50 wt% of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof;
- c. from about 1 to about 20 wt% of a film-forming agent selected from of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof; and
- d. optionally, from about 0.01 to about 10 wt% of a skin care ingredient selected from the group consisting of Monographed I actives, Monographed III actives, vitamins, proton donating agents, protease inhibitors, enzyme inhibitors, chelating agents, anti-microbials, skin soothing agents, and mixtures thereof; and

wherein the composition is resistant to water, wash-off, and rub-off.

21. The disposable absorbent article of Claim 20, wherein the skin-contacting surface is selected from the group consisting of a topsheet, a cuff, a side panel, a waist region, a secondary layer underlying a topsheet, a bowel movement pocket, an insertable element inserted into the absorbent article for use during wear, and combinations thereof.

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22. The disposable absorbent article of Claim 20, wherein the skin conditioning agent is a petroleum-based emollient selected from the group consisting of petrolatum, mineral oil, and mixtures thereof.
23. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an organic viscosity enhancing agent having a melting point of at least about 35°C.
24. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is a wax.
25. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an alcohol selected from the group consisting of cetyl alcohol, stearyl alcohol, behenyl alcohol, and mixtures thereof.

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PROCTER&GAMBLE

5136263499 P.20/28

Case 8622

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In the Application of :
THOMAS J. KLOFTA, ET AL. :
Serial No.: 09/898,880 : Group Art Unit: 1616
Filed: July 3, 2001 : Examiner: K. M. George
For: FILM-FORMING COMPOSITIONS FOR :
PROTECTING SKIN FROM BODY :
FLUIDS AND ARTICLES MADE :
THEREFROM :

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is a Brief on Appeal of currently pending Claims 1-25 of the above-identified application of which Claims 1-19 have been withdrawn. Claims 20-25 were finally rejected in an Office Action dated August 6, 2003. A Notice of Appeal was transmitted on November 19, 2003. According to 37 C.F.R. § 1.192, this Brief is being filed in triplicate within two months of the Office date of receipt of the Notice of Appeal (November 19, 2003). As January 19, 2004, is a Federal holiday within the District of Columbia, this Brief is believed to be timely filed, per 35 U.S.C. § 21, on January 20, 2004. Authorization is given to charge any fees required under 37 CFR § 1.17 related to this appeal to Deposit Account No. 16-2480.

REAL PARTY IN INTEREST

The Appellants who are named in the caption of the brief have assigned this application to the Procter & Gamble Company.

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RELATED APPEALS AND INTERFERENCES

Appellants, Appellants' legal representative, and the assignee are not aware of any interferences or appeals which would be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 1-25 are currently pending. Claims 20-25 were finally rejected by an Office Action mailed on August 6, 2003. Claims 1-19 have been withdrawn.

The rejection of Claims 20-25 is being appealed. A copy of Claims 20-25 on appeal appears in the attached Appendix A.

STATUS OF AMENDMENTS

No amendments have been filed subsequent to the Examiner's final rejection of Claims 20-25.

SUMMARY OF THE INVENTION

The claimed invention relates to a disposable absorbent article. The disposable absorbent article has a film-forming composition (page 3, line 23 ~ page 15, line 13) disposed on at least a skin-contacting surface of the absorbent article (page 15, lines 24-32), wherein the composition is substantially anhydrous (page 3, line 34) and is solid or semi-solid at room temperature (page 4, line 8). The composition comprises:

- from about 1 to about 80, by weight percent, of a skin conditioning agent selected from the group consisting of petroleum based emollients; fatty acid esters; polysiloxanes; polyol polyesters; esters or ethers of polyhydroxy alcohols; fatty alcohol esters of polyprotic acids; animal oils, fats, and their derivatives; vegetable oils, hydrogenated vegetable oils, and their derivatives; branched hydrocarbons; fatty alcohol ethers; free sterols, sterol esters and their derivatives; sphingolipids; phospholipids; and mixtures thereof (page 5, lines 22-26);

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- from about 15 to about 50, by weight percent, of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof (page 10, lines 10-13);
- from about 1 to about 20, by weight percent, of a film-forming agent selected from the group consisting of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof (page 12, line 29 -page 13, line 23); and
- optionally, from about 0.01 to about 10, by weight percent, of a skin care ingredient selected from the group consisting of Monographed I actives, Monographed III actives, vitamins, proton donating agents, protease inhibitors, enzyme inhibitors, chelating agents, anti-microbials, skin soothing agents, and mixtures thereof (page 13, line 24 - page 14, line 16); wherein the composition is resistant to water, wash-off, and rub-off (page 3, lines 29-30 and page 1, lines 34-36).

Appellants have found that the claimed composition forms a film that adheres to the skin such that it resists rub-off by abrasion with clothing or other contacting surfaces and wash-off by water or other bodily fluids such as urine, menses, sweat, and runny bowel movements (page 1, lines 34-36). The film contains beneficial skin care ingredients and skin conditioning agents that are then held in intimate and prolonged contact with the skin such that they are able to provide benefit to the skin (page 3, lines 30-32).

ISSUE

Whether Claims 20-25 were properly rejected under 35 U.S.C. §103(a) as being unpatentable over Roe (5,609,587) in view Wenninger et al. (*Int. Cos. Inged. Dict. and Hand.*, 7th ed., 1997).

GROUPING OF CLAIMS

The claims stand and fall together with respect to the issue.

ARGUMENTS

Whether Claims 20-25 were properly rejected under 35 U.S.C. §103(a) as being unpatentable over Roe (U.S. Pat. No. 5,609,587) in view Wenninger et al. (*Int. Cos. Inged. Dict. and Hand.*, 7th ed., 1997).

The Office asserts that Roe discloses a diaper having a lotioned topsheet where the lotion composition comprises: 1) a liquid polyol polyester emollient; 2) an immobilizing agent(s) for the liquid polyol polyester emollient; 3) optionally, a hydrophilic surfactant; and 4) other optional components including film formers. The Office states that the skin-conditioning agent of Appellants' claimed invention is the polyol polyester disclosed in Roe. The Office states that the viscosity agent of Appellants' claimed invention is the immobilizing agent disclosed in Roe. The Office acknowledges that Roe does not teach the specific film-forming agent as claimed by the Appellants. In order to correct this deficiency, the Office states that Wenninger discloses the use of acrylates copolymers and polyethylene as film-forming agents. The Office concludes that it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the acrylates copolymers and polyethylene as disclosed in Wenninger in the invention of Roe. For the reasons discussed below, Appellants submit that the appealed claims are not rendered obvious over Roe in view of Wenninger.

The Office Improperly Uses a Reference that Teaches Away from Appellants' Claimed Invention

Appellants' Claim 20 recites a film-forming composition "wherein the composition is resistant to water, wash-off, and rub-off." Roe discloses that "it is important that the lotion composition also be sufficiently wettable to ensure that liquids will transfer through the topsheet." Col. 21, lines 44-46. Roe discloses that an optional hydrophilic surfactant may be employed to provide wettability to the Roe lotion composition; however, Roe states "immobilizing agents such as C₁₆-C₁₈ fatty alcohols having HLB (hydrophilic-lipophilic balance) values below about 7 will *require* addition of hydrophilic surfactant to improve wettability." Col. 21, lines 57-59 (emphasis added). The Office states that the Appellants' viscosity enhancing agents (e.g., C₁₂-C₆₀ alcohols) are the same as the immobilizing agents of Roe. Summing up, according to Roe, use of fatty alcohols as the immobilizing agents requires the use of hydrophilic surfactants to increase wettability.

Wettability is clearly not desired in Appellants' invention. Appellants' Claim 20 recites the composition to be resistant to water and substantially anhydrous. A lotion composition containing a hydrophilic surfactant as required by Roe would not be resistant to water and anhydrous since the hydrophilic surfactant is taught to increase the wettability of the lotion. The law clearly states, "It is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art." *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 4

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Cir. 1986). The Office has selectively chosen portions of Roe without a full appreciation of the teachings away from the Appellants' claimed invention. Roe, when using Appellants' C12-C60 alcohols, requires use of a hydrophilic surfactant which is contrary to Appellants' claimed limitation of a lotion composition that is substantially anhydrous and resistant to water and wash-off.

The Office Fails to Establish a *Prima Facie* Case of Obviousness by Failing to Teach All Appellants' Claim Limitations

To establish a *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981 (CCPA 1974). The Office has failed to teach or suggest at least two of Appellants' claimed limitations.

First, the references presented by the Office fail to teach or suggest a lotion composition resistant to water, wash-off, or rub-off. Claim 20 recites the limitation of a film-forming composition "wherein the composition is resistant to water, wash-off, and rub-off." Roe and Wenninger fail to teach or suggest a composition that is resistant to water, wash-off, and rub-off. Likewise, the hypothetical combination of Roe and Wenninger provides no teaching or suggestion of resistance to water, wash-off, or rub-off. As a result, the Office has failed to make a *prima facie* case of obviousness since all the claimed limitations are neither taught nor suggested in the references either separately or in combination.

Second, the references presented by the Office fail to teach or suggest a lotion composition comprising the claimed film-forming agents. Claim 20 recites the limitation of a film-forming agent selected from "polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof." Case law supports the rule that a claimed species or subgenus encompassed by a prior art genus is not sufficient by itself to establish a *prima facie* case of obviousness. *See In re Baird*, 16 F.3d 380 (Fed. Cir. 1994); MPEP 2144.08. Such is the case in the present application. Roe discloses a genus of film formers that can be optionally used in a lotion composition. Appellants identify and claim three discrete compounds (i.e., polyalkenes, PVP/alpha-olefin copolymers, and acrylic copolymers) that may be used as film forming agents. The Office states, "With respect to the specific film forming agents as claimed by the applicant, it is the position of the examiner that the disclosure of film formers is directed to a broad category and that all compounds that are film formers fall within its scope."

The Office also offers Wenninger as a reference teaching the use of acrylates copolymer and polyethylene as film formers. While Wenninger does disclose acrylates copolymer and polyethylene as being film formers, Wenninger is a dictionary listing all film formers for use

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within a cosmetic. Wenninger discloses nothing more than the genus of film formers, albeit by defining the genus by every possible species. Appellants assert that the Office has substituted the genus presented in Wenninger for the genus presented in Roe. As a result, the basis for the rejection of a particular species is still improperly based upon the disclosure of a genus which in itself is insufficient to establish a *prima facie* case of obviousness.

The Office Fails to Provide a Suggestion or Motivation to Modify the References Cited

The Office has provided no suggestion or motivation to modify the references cited by the Office. Roe discloses several optional ingredients (e.g., water, pH reducing or buffering systems, vitamins, skin smoothing agents, anti-inflammatories, viscosity modifiers, perfumes, disinfectant antibacterial actives, pharmaceutical actives, film formers, deodorants, opacifiers, astringents, solvents, etc.) that may be used in a lotion composition. Col. 23, lines 27-44. From the numerous combinations that could be selected from the optional ingredients, one of ordinary skill in the art must first choose to focus on the film forming agents. Then, from a dictionary that lists all film formers used in cosmetics, one of ordinary skill in the art must then choose Appellants' film formers of polyalkenes, PVP/alpha-olefin copolymers, and acrylic copolymers.

As motivation for this combination of references, the Office quotes from Roe: "[A]ll these materials are well known in the art as additives for such formulations and can be employed in appropriate amounts in the lotion compositions of the present invention (of Roe)." See Office Action dated April 10, 2002, page 4; Office Action dated August 8, 2002, page 3; Office Action dated August 6, 2003, page 3. However, the "materials" Roe references are all the optional ingredients. The "motivation" asserted by the Office would leave one skilled in the art in the same position had no such motivation been provided. Namely, one skilled in the art must select film formers from the list of optional ingredients provided by Roe and then select the Appellants' specific film formers from a listing of all possible film formers as provided by Wenninger.

In *Ex parte Hiyamizu*, 10 USPQ2d 1993 (BPAI 1988), the Board stated that "there should be something in the prior art or a convincing line of reasoning in the answer suggesting the desirability of combining the references in such a manner as to arrive at the claimed invention." The Office has failed to establish a *prima facie* case of obvious since there is nothing in the cited references nor a line of reasoning to suggest combining the references to yield the Appellants' claimed invention.

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The Office Fails to Provide an Enabling Disclosure from the References Cited

Case law states that the "[r]eferences relied upon to support a rejection under 35 U.S.C. 103 must provide an enabling disclosure, i.e., they must place the claimed invention in the possession of the public." *In re Payne*, 606 F.2d 303, 314 (CCPA 1979). Roe and Wenninger merely teach the use, without specificity or quantification, of optional ingredients in the lotion composition and article disclosed in Roe. The possible resultant combinations of each optional ingredient both alone and in combination with the other optional ingredients are numerous. Since no teaching exists within the reference, the appropriate amount of any selected optional ingredient must be determined experimentally by one skilled in the art. The Office has asserted that "determination of particular concentrations is within the skill of the ordinary worker as part of the process of normal optimization." See Office Action dated March 19, 2003, page 3. However, given the number of optional ingredients available, the number of possible species available for each optional ingredient, and the experimentation necessary to determine the appropriate amount of each species; the teachings of Roe and Wenninger are at best an invitation to try various combinations of the optional ingredients at variable amounts. Case law clearly states that "obvious to try" is not the standard for obviousness. See *In re Geiger*, 815 F.2d 686, 687 (Fed. Cir. 1987). As such, the Office has failed to establish a *prima facie* case of obvious.

SUMMARY

The Appellants submit that they have shown that the Examiner's final rejection of Claims 20-25 was improper and that the claims are unobvious over the cited art. Accordingly, the Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection under 35 USC § 103(a) and remand with directions to allow all of the pending claims of the present application.

Respectfully submitted,

For: Thomas J. Klofta et al.

By Eric T. Addington

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(513) 626-1602

Date: January 20, 2004
Customer No. 27752

In the Appeal of
Application Serial No. 09/898,880

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Appendix A

20. A disposable absorbent article having a film-forming composition disposed on at least a skin-contacting surface of the absorbent article, wherein the composition is substantially anhydrous and is solid or semi-solid at room temperature, the composition comprises:

- a. from about 1 to about 80 wt% of a skin conditioning agent selected from the group consisting of petroleum-based emollients; fatty acid esters; polysiloxanes; polyol polyesters; esters or ethers of polyhydroxy alcohols; fatty alcohol esters of polyprotic acids; animal oils, fats, and their derivatives; vegetable oils, hydrogenated vegetable oils, and their derivatives; branched hydrocarbons; fatty alcohol ethers; free sterols, sterol esters and their derivatives; sphingolipids; phospholipids; and mixtures thereof;
- b. from about 15 to about 50 wt% of a viscosity enhancing agent selected from the group consisting of C12-C60 alcohols, waxes, fumed silicas, and mixtures thereof;
- c. from about 1 to about 20 wt% of a film-forming agent selected from of polyalkenes, PVP/alpha-olefin copolymers, acrylic copolymers, and mixtures thereof; and
- d. optionally, from about 0.01 to about 10 wt% of a skin care ingredient selected from the group consisting of Monographed I actives, Monographed III actives, vitamins, proton donating agents, protease inhibitors, enzyme inhibitors, chelating agents, anti-microbials, skin soothing agents, and mixtures thereof; and

wherein the composition is resistant to water, wash-off, and rub-off.

21. The disposable absorbent article of Claim 20, wherein the skin-contacting surface is selected from the group consisting of a topsheet, a cuff, a side panel, a waist region, a secondary layer underlying a topsheet, a bowel movement pocket, an insertable element inserted into the absorbent article for use during wear, and combinations thereof.

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22. The disposable absorbent article of Claim 20, wherein the skin conditioning agent is a petroleum-based emollient selected from the group consisting of petrolatum, mineral oil, and mixtures thereof.
23. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an organic viscosity enhancing agent having a melting point of at least about 35°C.
24. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is a wax.
25. The disposable absorbent article of Claim 20, wherein the viscosity enhancing agent is an alcohol selected from the group consisting of cetyl alcohol, stearyl alcohol, behenyl alcohol, and mixtures thereof.